Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-1341

In the Supreme Court of the United States

OCTOBER TERM, 1974

WESLEY MERRITT, A/K/A WESLEY MERRITT, JR.
AND JOHN WESLEY MERRITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1341

WESLEY MERRITT, A/K/A WESLEY MERRITT, JR.
AND JOHN WESLEY MERRITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on three counts of willfully attempting to evade and defeat his income tax for the years 1967, 1968, and 1969, in violation of 26 U.S.C. 7201.[1] He was sentenced to five years' imprisonment and a $5,000 fine on each of the three counts. However, the court suspended the execution of the sentence of imprisonment and placed petitioner on probation with respect to the second count and directed that the sentence of imprisonment with respect to the third count run concurrently with the sentence on the first count (App. 943-944).[2]

---

[1]The indictment also charged petitioner with tax evasion for the years 1965 and 1966, but the jury acquitted as to those years.

[2]"App." refers to the appendix filed in the court of appeals.

Petitioner contends (Pet. 8) that the government's proof failed to establish a satisfactory starting point for the computation of unreported income by the net worth method. The evidence presented at trial, however, effectively refutes petitioner's contention.

The proof showed that petitioner furnished the Treasury agents no books or records from which his income could be computed; that the agents conducted an exhaustive investigation into his financial affairs and reconstructed his income by use of the net worth method; that this reconstruction proved that petitioner had realized unreported taxable income during the years 1967 through 1969 in excess of $464,000; that petitioner concealed more than 90 percent of his income tax liability for those three years, reporting less than $27,000 when the correct figure was well in excess of $300,000; that it was petitioner's practice to invest funds in the names of other persons and to deal in cashiers' checks and in large sums of currency; that the great bulk of petitioner's income arose from the operation of a lottery (numbers game) during the prosecution years; and that he was actually convicted in 1969 of conducting a lottery (App. 150-152, 414-421, 437-438, 626-627; V-R.3, 12-14, 96-100, 106-120, 136; X-R. 48-49).[3]

During the investigation, petitioner admitted to the agents that neither he, his wife, nor any members of his immediate family had ever received any type of inheritance and that he could not recall ever having received a gift in excess of $500 (App. 22). Petitioner also stated that during the years 1964 through 1969 he had not kept any substantial sums of currency on hand because when he earned it he immediately invested it (App. 22-23). He filed no income tax returns for the years 1956 through 1963 (II-R. 23, 24, 26).

[3]"R." refers to the original record on appeal.

At trial, petitioner claimed for the first time that at the starting point of the government's net worth analysis (December 31, 1964), he had between $320,000 and $330,000 of undeposited cash on hand (App. 711), which, if true, would have accounted for most of the unreported funds claimed by the government to be income. But petitioner admitted that this money, most of which he claimed was earned between 1960 and 1964 (App. 749, 759), had never been reported on his income tax returns (App. 754). The jury was accordingly presented with the question whether petitioner was telling the truth in 1970, when he talked to the Treasury agents, or at the time of trial.

Petitioner's trial position was undermined by the fact that during the years when he was supposedly accumulating this money, he did not file income tax returns; that he lived in a rather poor neighborhood until 1966, when he moved to a substantially better one (App. 418); and that some of the bills he brought into court with the claim that they had been buried in the ground since 1964 were bills that did not exist until later dates (App. 767-768, 842, 850-852). With petitioner's trial testimony thus discredited before the jury, and with the government's proof of corroborated admissions by petitioner of no substantial cash on hand at the starting point (*United States* v. *Calderon*, 348 U.S. 160, 165-167; *Smith* v. *United States*, 348 U.S. 147, 157-159), there was a solid case for submission to the jury.

Of course, the government's failure to credit petitioner with any cash on hand at the starting point did not mean that he had no cash whatsoever, but only that there was no way to determine the precise amount of cash. In any event, it was clear that petitioner could not have had enough cash on hand to have affected the result of the net worth analy-

sis.[4] Moreover, when the jury found petitioner not guilty for the years 1965 and 1966—the years where the government's reconstruction showed unreported income of more than $37,000 (App. 626)—it may have had a reasonable doubt as to the cash on hand at the beginning of those years. But its return of guilty verdicts as to 1967, 1968, and 1969 showed that it had no such doubt as to those years.[5]

Thus, in light of the foregoing evidence, the starting point net worth was established with "reasonable certainty," *Holland* v. *United States*, 348 U.S. 121, 132, and the case was properly submitted to the jury for its resolution of the credibility of petitioner's belated claims of a large cash hoard at the starting point.

Petitioner further contends (Pet. 16-17) that the trial court erred in charging the jury that theft losses by a taxpayer are deductible only in the year when such theft is discovered. Such charge was a correct statement of the law (see Section 165(e) of the Internal Revenue Code of 1954 (26 U.S.C.)). Here, petitioner stated in a deposition taken in 1972 that he made no claim as to any mishandling of the $105,000 by the bank employee Stokes and admitted that he had received a full accounting for it (XVI-R. 75-76). However, at trial, petitioner took the position that Stokes embezzled the $105,000 from petitioner in 1969, and that therefore there was a loss offsetting the $105,000 cash on hand included in the government's net worth reconstruction (App. 699-701).

---

[4]As petitioner points out (Pet. 8, 11), a $90,000 cash on hand item was included in the government's reconstruction of petitioner's net worth as of December 31, 1968. However, that item, like the $105,000 item of cash on hand as of December 31, 1969 (App. 590), was supported by proof consisting of a deposition taken from petitioner in other proceedings and the trial testimony of Joel Stokes, a bank employee who was the custodian of the funds (see III-R. 39-56, 62-64, 67-74; XI-R. 46 *et seq.*, 82 *et seq.*). (See App. 68-84, 90-93.)

[5]While it is true, as petitioner contends (Pet. 13), that certain restaurants and lounges were shown on the government's net worth analysis at zero valuation because the government was unable to prove the cost of these assets, they were carried as zero throughout the prosecution years and thus had no effect on the net worth increases.

If such a loss were credited to petitioner in the year 1969, by omitting the $105,000 item from his closing net worth for that year, it would have reduced his alleged unreported income by $105,000. But if the loss was not deductible until it was discovered, there would have been no need for the jury to consider the possible elimination of the $105,000 item because there was no evidence that petitioner discovered the alleged loss by 1969. In view of the position taken by petitioner at trial, that the purported embezzlement occurred in 1969, the trial court's instruction that embezzlement losses are deductible only in the year of discovery was necessary for the jury's guidance.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.